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Supreme Court, U.S.
FILED
JAN 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ISADORA KARASH as Guardian ad Litem for MICHAEL E. LOWE, a minor,

Plaintiff and Appellant,

vs.

COUNTY OF SAN DIEGO,

Defendant and Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

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QUESTION PRESENTED

Is California Welfare and Institutions Code Section 5154, or any such other California statute purporting to give absolute immunity from liability to Governmental psychotherapists from the Tarasoff rule, invalid as a violation of Equal Protection since it unfairly, unequally, and arbitrarily distinquishes between the rights of victims of involuntarily treated patients versus voluntarily treated patients, and between the rights of victims of publicly treated patients versus privately treated patients?

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INDEX

Question Presented..... Prefix

Opinion Below..... 2

Jurisdiction..... 3

Constitutional Provisions Involved.... 3

Statement of the Case..... 4

Reasons for Granting the Writ

This case raises very fundamental issues with respect to a State's ability to shield itself from liability by engaging in invidious discrimination against a class of persons, i.e., victims of involuntarily treated ex-patients of public institutions, when there is simply no rational reason for such discrimination and the legitimate State interest involved would logically permit liability rather than prevent it. 20

Conclusion..... 29

Appendix "A" - California Court of Appeal Published Opinion

Appendix "B" - California Supreme Court Denial of Petition for Review

U.S. Constitution

Amendment XIV..... 3

Federal Statutes

28 U.S.C. Section 1257(3)..... 3

Federal Cases

Levy vs. Louisiana, 391 U.S. 68, 88 S.Ct.Rptr. 15059 (1968).... 22,23

State Statutes

California Welfare and Institutions Code, Section 5150..... 24,25

California Welfare and Institutions Code, Section 5154..... 3,21,27

California Welfare and Institutions Code, Section 5001(a)(g)..... 27

California Government Code, Section 856..... 4,28

Lanterman-Petris-Short Act, A.B. 1220, 1220, Section 5151, 1967 Reg. Sess. (amended May 18, 1967) (In Pertinent Part)..... 27

State Cases

Tarasoff vs. Regents of the University of California, 17 Cal.3d 425, 131 Cal.Rptr. 14 (1976)..... 2,22,24,25 27,28,29

Secondary Authorities

Simpson, A Method for Analyzing Discriminatory Effects under the Equal Protection Clause, 29 Stanf. L. Rev. 663 (1977)..... 21

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

This is an appeal from a judgment in a civil wrongful death case in which a nonsuit was granted, following the opening statement to the jury, primarily on the grounds of Governmental immunities under California law. The gravamen of the lawsuit involves liability of County psychotherapists in not taking reasonable steps to protect a known, foreseeable victim of an ex-patient under

Tarasoff vs. Regents of the University of California, 17 Cal.3d 425, 131 Cal.Rptr. 14 (1976).

The petitioner, real party in interest MICHAEL E. LOWE, a minor, by and through his Guardian ad Litem, ISADORA KARASH, respectfully prays that a Writ of Certiorari issue to review the Judgment of the California Court of Appeal which was rendered in a Published Opinion on July 18, 1986, on a 2-1 vote, with the Honorable Justice STANIFORTH dissenting. Thereafter, an Order denying review of the California Supreme Court was issued on October 22, 1986.

OPINION BELOW

The Opinion below is the published Opinion of the California Court of Appeal which is attached hereto as Appendix "A". The denial of the "Petition for Review" by the California Supreme Court is attached hereto as Exhibit "B".

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

CALIFORNIA STATUTES CLAIMED TO BE UNCONSTITUTIONAL AS APPLIED WITHIN THE TARASOFF CONTEXT

Welfare and Institutions Code Section 5154:

> "The professional person in charge of the facility providing 72 hour treatment and evaluation, his designee, and the peace officer responsible for the detainment of the person shall not be civilly or criminally liable for any action by a person release at or before the

end of 72 hours pursuant to this article."

California Government Code Section 856, in pertinent part:

> "(a) Neither a public entity nor a public employee acting within the scope of his employment is liable for any injury resulting from determining in accordance with any applicable enactment:
>
> (1) Whether to confine a person for mental illness or addiction....
>
> (3) Whether to parole, grant a leave of absence to, or release a person confined for mental illness or addiction."

STATEMENT OF THE CASE

On October 9, 1977, MICHAEL RAY LOWE (hereinafter called "MICHAEL") shot and killed his wife, CECELIA KARASH LOWE (hereinafter called "CECELIA"), in her parent's El Cajon, California home; then he shot and killed himself (Reporter's

Transcript 178, hereinafter called R.T.). This murder-suicide marked the culmination of months of marital difficulties. CECELIA initially left her husband, MICHAEL, in the Spring of 1977 and filed a dissolution of marriage (R.T. 158). The couple attempted to reconcile their differences and in the Summer of 1977, the dissolution was postponed. CECLIA, MICHAEL, and their son, MICHAEL E. LOWE, born November 1975 (hereinafter called "MIKIE"), resumed living together in Ramona, California. Problems continued to plague the marriage, however, particularly MICHAEL's drinking and the accompanying irrational

[1]

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1. Please note that the factual basis for the nonsuit decision included more than the opening statement. The trial court was gracious enough to incorporate all statements of facts which the plaintiff said could be proven from the outset of the trial, including discussions in limine outside the hearing of the jury (R.T. 221, 224). Judge Lewis stated: "I've incorporated everything, Mr. Zeidman" (R.T. 221).

behavior (R.T. 158; Clerk's Transcript 52, hereinafter called C.T.).

These problems were brought to a head by a critical event which occurred on July 30, 1977: MICHAEL repeatedly shot and finally killed the family sheepdog in the presence of his wife and young son (R.T. 158, 159). He used a .357 Magnum pistol and fired six shots into the dog. After inflicting each wound, MICHAEL would cajole the dog back to him, and then shoot the animal again (R.T. 159). Finally, MICHAEL used a rifle to fire a final shot into the dog's head. CECELIA reported this incident to the County Humane Society, which investigated and subsequently referred the matter to the District Attorney's Office in El Cajon (R.T. 160). Eventually, a misdemeanor criminal action was filed against MICHAEL by the District Attorney's Office for cruelty to animals (R.T. 160).

As CECELIA made the report to the Humane

Society, MICHAEL told her, "If you don't like it you can leave, but if you take my child, you'll be next" (R.T. 159). Convinced that she must leave her husband, CECELIA waited until MICHAEL was burying the dog, then took MIKIE and returned to the El Cajon residence of her parents, FRANK and ISIDORA KARASH (R.T. 160).

On that same day, after arriving at her parent's home, CECELIA telephoned the SAN DIEGO COUNTY SHERIFF'S DEPARTMENT and reported the dog-shooting incident. In response, Deputy JONATHON LOGAN came to the KARASH house and obtained the full details of the story from CECELIA (R.T. 160). He advised her that because this was a domestic matter, he was unable to do anything except advise her to obtain a Restraining Order (R.T. 160). On July 31, 1977, CECELIA saw her attorney and an Amended Petition for Divorce was filed with the Court. (R.T.

160). In addition, a Restraining Order was sought to keep MICHAEL away from CECELIA. On August 5, 1977, MICHAEL was served with the Petition and Restraining Order (R.T. 161). Meanwhile, CECELIA and MIKIE continued to reside at the KARASH home.

In the early morning hours of September 6, 1977, MICHAEL telephoned the California Highway Patrol and informed them that he was going to "shoot himself or anyone else" unless the police stopped him (R.T. 163). Officers RAINS and HILL from the El Cajon Police Department found MICHAEL sitting on a curb near the KARASH home, upset and crying (R.T. 161, 163). MICHAEL admitted that he had intended to kill his wife with the shotgun, shells and live ammunition the officers discovered in his pickup, but he claimed that he had reconsidered and now wanted to speak with a psychiatrist. (R.T. 162, 163). The officers took MICHAEL to the

police station, where they contacted CECELIA. She told the officers that in the past, MICHAEL had hit her and thrown her around, and that he had a drinking problem; she also related the dog-shooting incident (R.T. 163, 164). CECELIA agreed MICHAEL needed professional counseling and confided she knew he would try to harm her or MIKIE as a direct result of family problems (R.T. 164). MICHAEL indicated that he needed professional help and would cooperate (R. T. 164, 190).

Based on their discussions with MICHAEL and CECELIA, the officers compiled both a police report and a California Department of Health Section 5150 form whch included all of the above information. The 5150 form also indicated that the officers believed MICHAEL was a danger to himself, a danger to others, and gravely disabled (R.T. 164). MICHAEL was then voluntarily taken to COUNTY MENTAL

HEALTH (hereinafter CMH) and submitted for admission, accompanied by the 5150 form (R.T. 162, 165, 189-199). Officers Rains and Hill were under the impression they were compiling a voluntary commitment form, even though on its face the form states Sections 5150, which connotes an involuntary commitment (R.T. 190, C.T. 99).

The admitting psychiatrist at CMH noted MICHAEL was shaking and had been drinking; he requested in writing that the evaluating therapists investigate and rule out the explosive personality and paranoid personality (R.T. 165). MICHAEL was subsequently seen by Dr. SOCRATES PAPPAS, a staff psychiatrist, in an interview lasting approximately fifteen (15) minutes. Dr. PAPPAS ordered extensive testing by Dr. MARTIN SCHORR, a clinical psychologist (R.T. 166; C.T. 53). Neither Dr. PAPPAS nor Dr. SCHORR was ever designated as being in charge

by Dr. HIGGINS, the professional person in charge at CMH (R.T. 96, 98).

Although Dr. SCHORR's mental status examination (face to face observations of the patient's demeanor) indicated a calm patient, a battery of tests was conducted. The Rorschach (ink blot) test revealed an inwardly angry, explosive, paranoid-type personality with poor self-control, emotional immaturity and an orientation compatible with latent type schizophrenia (R.T. 167; C.T. 53). According to the Mooney Problem Checklist, MICHAEL suffered from serious marital maladjustmnts (R.T. 167; C.T. 54). In sum, Dr. SCHORR determined that MICHAEL was a dangerous person, comparable to a walking time bomb. Alcohol and other stresses could well be the fuse igniting the explosion (R.T. 167; C.T. 54).

Despite these determinations, Dr. SCHORR did not examine the police report revealing

MICHAEL's threats toward his wife and the dog-shooting incident (R.T. 167; C.T. 54). He simply recorded the test results and passed his conclusions on to Dr. PAPPAS (R.T. 167; C.T. 54). At no time prior to CECELIA's death did Dr. PAPPAS and Dr. SCHORR discuss the results of these tests, nor did Dr. SCHORR communicate with his team members at CMH to ascertain that MICHAEL was receiving proper treatment (R.T. 167, 172; C.T. 57). In addition, Dr. SCHORR did not take any protective steps to assure the safety of CECELIA or MIKIE (R.T. 172; C.T. 57). He did not contact the authorities nor did he attempt to advise CECELIA of MICHAEL's dangerousness (R.T. 172, C.T. 57).

After undergoing several hours of psychological testing with Dr. SCHORR, MICHAEL again met with Dr. PAPPAS (R.T. 168; C.T. 54). At this point, Dr. PAPPAS had before him the results of the psychological

tests, including the Rorschach findings and Dr. SCHORR's determination that MICHAEL was dangerous and a latent schizophrenic with explosive paranoid traits (R.T. 168, 169; C.T. 54). From the report of the El Cajon Police Department, he knew that his patient had threatened to shoot and kill his wife and himself only the day before (R.T. 190, C.T. 99). Dr. PAPPAS also knew of MICHAEL's history of marital and drinking problems and abusiveness toward his wife and that MICHAEL, asking for psychiatric help, had been found crying beside his truck with weapons and ammunition inside the vehicle. (R.T. 168; C.T. 54). Finally, Dr. PAPPAS was aware of the dog shooting incident, and that MICHAEL was determined by the El Cajon Police Department to be a danger to himself or others and gravely disabled (R.T. 169; C.T. 54, 55). After a fifteen minute interview, during which he observed that his patient

appeared calm and appreciative and eager to return to work, Dr. PAPPAS released MICHAEL from CMH (R.T. 169, C.T. 55).

At no time subsequent to MICHAEL's release did Dr. PAPPAS take any protective steps to assure the safety of CECELIA (R.T. 169, C.T. 55). He attempted to contact CECELIA to inform her that MICHAEL was at CMH, but was unable to reach her on the telephone. No further attempts to contact CECELIA were made (R.T. 169; C.T. 55). Although MICHAEL was advised to proceed with private psychological care with a Dr. OLENIK, neither Dr. PAPPAS nor anyone else at CMH conducted a follow-up investigation to determine whether MICHAEL was indeed seeking treatment (R.T. 169; C.T. 55). In fact, MICHAEL never showed up for his scheduled appointment with Dr. OLENIK (R.T. 169).

Furthermore, the plaintiff's chief psychiatric expert, Dr. THOMAS RUSK, states

that the following omissions were below the standard of care of the reasonable psychiatrist under the circumstances: (1) Not making attempts to counsel CECELIA on how to handle MICHAEL's personality and his violent behavior; (2) not establishing therapy for CECELIA; (3) not warning her to limit contact with him and to (4) never be alone with him; and (5) not assuring that MICHAEL was attending therapy on his own (R.T. 171, 172; C.T. 56).

On Saturday, October 8, 1977, approximately one month following MICHAEL's release from CMH, CECELIA drove MIKIE to Ramona at MICHAEL's request; MICHAEL claimed that he was unable to come to El Cajon to visit MIKIE because his truck had broken down (R.T. 173; C.T. 57). While at the Ramona residence, MICHAEL threatened to tie her up and beat her unless she submitted to sexual intercourse (R.T. 173; C.T. 57). CECELIA

reluctantly submitted to sexual intercourse, then immediately returned with her son to her parent's home in El Cajon (R.T. 173; C.T. 57). Within thirty minutes, CECELIA telephoned the Sheriff's Department to report MICHAEL's threats and abusive behavior (R.T. 173; C.T. 57).

In response to CECELIA's telephone call, Deputy JONATHON LOGAN was dispatched in his squad car to the KARASH residence in El Cajon (R.T. 173; C.T. 57). Deputy LOGAN said it was a civil matter and there was nothing he could do. (RT. 174; C.T. 58). At approximately 4:00 p.m. on the following afternoon of October 9, 1977, MICHAEL arrived at the KARASH residence (R.T. 176, 177). CECELIA, MIKIE, and Mrs. KARASH were sitting in the kitchen when he arrived. As soon as MICHAEL drove up, CECELIA ran to telephone the SHERIFF'S DEPARTMENT and Mrs. KARASH locked the sliding glass door. (R.T. 177)

Mrs. KARASH picked up her grandson and ran into the living room. However, MICHAEL was not deterred -- using a rock to shatter the glass, he broke into the house and chased Mrs. KARASH through the house (R.T. 177). He beat her with a lead pipe, fracturing her skull and arm (R.T. 177). In a daze, Mrs. KARASH escaped from the house and sought help. As she was leaving, Mrs. KARASH heard CECELIA say "MICHAEL, please don't. Don't" (R.T. 177).

MICHAEL shot CECELIA in the back and in the temple as she was telephoning the SHERIFF's DEPARTMENT. She died immediately. (R.T. 178). He then turned the rifle upon himself, firing a fatal shot into his chest (R.T. 178).

According to a child psychologist who has treated MIKIE since his parent's deaths, MIKIE witnessed the brutal murder-suicide (R.T. 178, 179). At the time of their

deaths, MIKIE was almost two years old (R.T. 178). MIKIE remained in the home with the lifeless bodies of his mother and father for eight (8) to nine (9) hours, during which time MIKIE could periodically be heard sobbing (R.T. 178, 179). The El Cajon SWAT team did not want to move in until they knew it was safe (R.T. 179). Finally, after the eight to nine hour wait, the SWAT team fired tear gas cannisters through the windows, rushed into the house, and returned MIKIE to his grandfather (R.T. 179). A short time after the shooting, MIKIE took his grandfather to the spot where CECELIA and MICHAEL died and said, "Daddie shoot Mama. Daddy go bang-bang" (R.T. 179).

On August 9, 1978, GEORGE G. HURST, on behalf of MICHAEL E. LOWE, filed a negligence action against respondent COUNTY OF SAN DIEGO

(C.T. 1-3). The Third Amended Complaint was filed on June 16, 1983, claiming respondent failed to use reasonable care to prevent MICHAEL RAY LOWE from causing injury to others (C.T. 17). The complaint also claimed the SAN DIEGO COUNTY SHERIFF'S DEPARTMENT acted negligently in its representations to CECELIA KARASH LOWE (C.T. 20). Respondent seeks damages for wrongful death and negligent infliction of emotional distress, in a sum according to proof, plus costs of suit (C.T. 31-33).

ISIDORA KARASH was officially appointed as Guardian ad Litem for MICHAEL E. LOWE on June 12, 1984 to prosecute this action (C.T. 47-50). Opening statement was presented by appellant and respondent moved for a nonsuit as to all remaining causes of action (R.T. 182-186). The San Diego Superior Court granted this motion, the judgment was entered, and petitioner appealed the Court of

Appeal. Court (C.T. 100, 103, 109). Petition for Review was denied thereafter by the California Supreme Court.

REASONS FOR GRANTING THE WRIT

This case raises very fundamental issues with respect to a State's ability to shield itself from liability by engaging in invidious discrimination against a class of persons, i.e., victims of involuntarily treated ex-patients of public institutions, when there is simply no rational reason for such discrimination, and any legitimate State interest involved would logically permit liability rather than prevent it.

While this case, on "first blush", may appear too "fact-bound" to create a justiciable Constitutional controversy for this Court, very serious Equal Protection issues are raised nonetheless.

In a word, the Equal Protection Violation argument can be succinctly phrased

as follows:

> Section 5154 by its statutory terms grants immunity only if the tortfeasor/patient was involuntarily committed. Thus, there exist two separate classes of Tarasoff tort victims. There are those who are maimed or killed by voluntarily treated ex-patients who have been released on their own, and there are those who are maimed or killed by involuntarily treated ex-patients who have been released on their own. The former victims can sue but the latter cannot. Thus, the question is: What rational relationship is there between having two such separate classes of tort victims and any legitimate State interest?

Quite simply, the answer is that there is none.

Of course, here petitioner has assumed arguendo that one uses the lowest level of scrutiny, i.e., the rational relationship test, to show that Section 5154 cannot pass Constitutional muster.

This is not to say that the strict scrutiny test or some variation on a sliding scale should not be used. (Please see Simson, A Method for Analyzing Discriminatory

Effects under the Equal Protection Clause, 29 Stanf. L. Rev. 663 (1977).) After all, the duty to be upheld, i.e., the Tarasoff duty, inures to the benefit of the most fundamental of rights: the right to life, or more to the point here, the right to a mother who is alive; in other words, the right not to be killed by an ex-patient of a facility having such immunity. The main point here is that the distinction between the classes of tort victims of voluntarily versus involuntarily treated ex-patients is purely arbitrary.

The case at bar is not unlike Levy vs. Louisiana, 391 U.S. 68, 88 S.Ct.Rptr. 1509 (1968). Therein, this Court struck down a Louisiana statute on Equal Protection grounds in the denial to illegitimate children the right to recovery for the wrongful death of their mother.

Therein, the Honorable Justice DOUGLAS asked the following questions:

> "Why should the illegitimate child be denied rights merely because of his birth out of wedlock? ...How, under our Constitutional regime, can he be denied correlative rights which other citizens enjoy?" (Id. at page 71).

Likewise, in the case here: Why should a victim of an ex-patient of a psychiatric entity be denied rights merely because the tortfeasor was initially treated involuntarily rather than voluntarily or because the tortfeasor was initially treated by a public facility rather than a private facility? Indeed, why does the State confine intractable mental patients at all? Why does the State attempt to rehabilitate those mental patients who can be cured or treated? The answer to both questions is the same, i.e., for protection of the public at large. In other words, granting immunity on the grounds in this case only serves to hinder rather than enhance the major legitimate State interest involved, i.e., protection of

the public at large and, in particular with respect to the Tarasoff concept, protection of known, foreseeable potential victims.

Furthermore, the essence of the Equal Protection clause is to afford persons who are under like circumstances equal protection and security in their enjoyment of personal and civil rights and the prevention and redress of wrongs. Once a patient is released from CMH to obtain voluntary treatment on his own, he becomes an ex-patient whether he was initially treated voluntarily or involuntarily. (Please see California Welfare & Institutions Code Section 5150: "...persons who have been detained for evaluation and treatment shall be released, referred for further care and treatment on a voluntary basis, certified for intensive treatment, or a conservator or temporary conservator shall be appointed pursuant to this part as required."

(Emphasis added)). The County has the same degree of control or lack of control over each type of ex-patient who is released on his own.

Thus, any one potential tort victim is in precisely the same position as any other potential tort victim, whether the ex-patient tortfeasor is in one class or the other. Therefore, there is no reasonable basis for distinguishing between the two classes of victims with respect to the Tarasoff duties which the CMH staff should owe to each class. On the contrary, there is a very legitimate State interest and a most reasonable basis, i.e., protection of the public from ex-patients released and left to their own devices, for the law to treat each class the same. Once the decision is made to release a detainee, whether initially detained under 5150 (involuntarily) or not, the result is the same; he is free to seek further

treatment or not, he is free to associate with his potential victim or not, he is no longer within the direct control of the CMH or the State.

On the other hand, by way of a contrasting example, if the distinctions were between those tort victims injured by current patients and those injured by ex-patients, there may exist a legitimate and reasonable State objection, i.e., grant immunity only while the person is a patient so that CMH will have an unencumbered ability to treat the individual, while he is in the Governmental mental health faciltiy. Under this scenario, the tort victims are not similarly situated: One is injured by a person (patient) still under the direct control of CMH at a CMH facility, and the other is injured by a person (ex-patient) no longer under the direct control of CMH. Of course, such is not the case here.

More to the point, none of the express "purposes" of the California Lanterman-Petris-Short Act, of which Section 5154 is a part, are enhanced by giving the immunity sought here by the County. Once again, quite the contrary, those purposes, particularly "public safety", dovetail nicely with the goals of Tarasoff itself. (Please see California Welfare & Institutions Code Section 5001(a)(g).)

In a word, it quite simply makes no sense whatsosever to treat the two classes in a different manner. Simply no legitimate State purpose is enhanced by giving Tarasoff immunity to the one and not the other. (Please see, especially, Section VI of the Dissenting Opinion of the Honorable Justice STANIFORTH in the Appellate Opinion below with respect to the Equal Protection issue.)

While the case below turned completely on the 5154 immunity issue, the Opinion of

the Court of Appeal also contained "dicta" with respect to a possible immunity under California Government Code Section 856. (Please note that petitioner vehemently argued, and still does, that Section 856, by its own terms, simply does not apply here. Petitioner is not suing the County for failure to confine MICHAEL LOWE. The Tarasoff duties and the confinement issues should not be confused. Indeed, certain Tarasoff duties to the potential victim would exist even if the potential tortfeasor remained confined.)

While Section 5154 distinguishes between the victims of involuntarily treated patients versus voluntarily treated patients, Government Code Section 856, according to the "dicta," distinguishes between the victims of publicly treated patients versus privately treated patients. In the "dicta" the Appellate Court took great pains to fashion

some further "apparent" immunity. The result was a legal stretching exercise which changed a statute which is facially constitutional (Section 856) into one which is blatantly unconstitutional as applied in the Tarasoff context.

There is simply no rational or legitimate State purpose in granting to publicly employed psychotherapists an immunity under Tarasoff that private psychotherapists do not have. If Tarasoff is to mean anything at all, and if the Equal Protection clause is to mean anything at all, the rights of victims must not turn on such arbitrary and capricious distinctions. Once again, the ultimate legitimate State interest, in a Tarasoff context, public safety, argues for liability and against immunity, particularly for public facilities since those are the ones most often involved in the handling of the most potentially

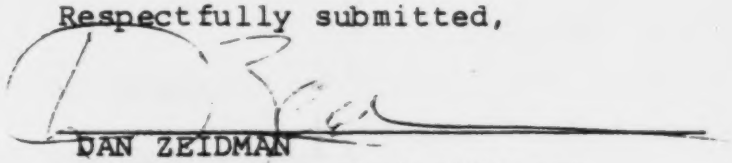
violent members of society.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that a Writ of Certiorari issue to review the Appellate Opinion of the California Court of Appeal.

Dated: January 16, 1987

Respectfully submitted,



DAN ZEIDMAN
Attorney for Plaintiff and Appellant

CERTIFIED FOR PUBLICATION

COUNTY OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ISADORA KARASH, etc.,	)	
	)	
Plaintiff and Appellant,	)	
	)	
v.	)	D 0001950
	)	
COUNTY OF SAN DIEGO,	)	
	)	(Super.Ct.No.420863)
Defendant and Respondent.	)	

APPEAL from a judgment of the Superior Court of San Diego County, in favor of the County of San Diego entered upon the grant of a nonsuit following plaintiff's opening statement Gerald J. Lewis, Judge. Affirmed.

Thacher, Hurst, Conaway & Zeidman, Dan Zeidman, White and Bright and David Bright for Plaintiff and Appellant.

Lloyd Harmon, Jr. County Counsel, Daniel J. Wallace, Chief Deputy County Counsel, and Nathan C. Northup, Deputy County Counsel, for

APPENDIX "A"

Defendant and Respondent.

This appeal concerns the liability of the County under the rationale of the holding in Tarasoff v. Regents of University of California (1976) 17 Cal. 3d 425, for damages arising out of (1) the claimed negligence of a psychiatrist employed by the County at the community mental health center CMH) in failing to warn a wife of her husband's known dangerous propensities for the infliction of harm upon her and (2) the claimed negligence of a deputy sheriff in failing to protect her from her husband. The damages are sought by the guardian for Mikie, whose mother was killed by his father who then committed suicide. We shall hold the psychiatrist owed a duty to exercise reasonable care to avoid harm to the wife at the hands of her husband, but the psychiatrist and thus the County are entitled to community. We shall also hold the deputy sheriff and thus the County are

not liable in the circumstances presented and affirm the judgment.

I

We state the facts as presented in the opening statement as amplified in pretrial and motion proceedings. October 9, 1977, Michael Ray Lowe shot and killed his wife Cecelia Karash Lowe and then himself with the same weapon. This murder-suicide culminated months of marital discord. Cecelia left Michael in early 1977, and filed dissolution proceedings. A reconciliation followed and they resumed living together that summer in Ramona with their son, two-year-old Mikie. Michael's drinking and irrational behavior continued. July 30, Michael repeatedly shot and eventually killed the family sheep dog, a friendly creature without dangerous propensities. Cecelia and Mikie were present.

Cecelia immediately reported the

incident to the humane society. Michael told her she could leave but if she took Mikie, "you'll be next." Cecelia left that same day while Michael was burying the dog. Taking Mikie with her, she moved in with her parents whose residence was in county territory adjacent to El Cajon. She called the sheriff's department and reported the shooting. After talking with Cecelia at the house, Deputy Jonathan Logan told her there was nothing he could do. The problem was domestic and she should ask her lawyer to get a restraining order.

The next day, July 31, Cecelia's lawyer filed an amended petition for dissolution and secured an order restraining Michael from being around Cecelia. Michael was served with the restraining order August 5.

September 6, at 3 a.m., Michael called the California Highway Patrol and said he was going to shoot himself or someone else unless

the police stopped him. El Cajon police officers found Michael in his parked truck. He was upset and weeping. He said he was having marital problems and wanted to talk with someone. The officers patted him down and found a shotgun and shells in the truck. Michael told them he came from Ramona, intending to shoot his wife, and had second thoughts. He wanted to speak to a psyciatrist.

The officers took Michael to the police station, compiled their report and called Cecelia to inform her of the episode. The report included Michael's statements he wanted to kill Cecelia, the officers' belief Michael would harm Cecelia given the opportunity and Cecelia's recognition Michael would try to harm her.

The officers filled out an involuntary commitment form and transported Michael to the CMH operated by San Diego County. He was

admitted shortly after 6 a.m. Admitting psychiatrist Dr. Blumenstein noted Michael's shakey appearance. Dr. Pappas examined Michael and ordered a battery of tests. Clinical psychologist Dr. Schorr administered the tests and determined Michael was an explosive paranoid with poor self-control, was emotionally immature and had a latent type of schizophrenia. He was a "walking time bomb."

Dr. Pappas saw Michael again. This time, he knew Michael had intended to kill Cecelia and was armed when picked up by the police. He knew the officers considered him a danger to Cecelia and that she was aware of and acknowledged her peril. Dr. Pappas knew about Michael's prior violence, the test results and Dr. Schorr's diagnosis Michael was an explosive paranoid and a latent schizophrenic. During this interview, Michael was relaxed, at ease with himself and anxious

to get back to work.

Dr. Pappas released Michael September 7, the day following his admittance, without further evaluation or treatment at CMH other than telling Michael to see Dr. Olenik, a psychiatrist in private practice. Michael did not contact Dr. Olenik.

October 8, Michael telephoned Cecelia asking to see Mikie. Lying, he claimed his truck had broken down. She drove to Ramona, was threatened by Michael, submitted to his demand for sexual intercourse, rushed back to El Cajon and promptly called the sheriff. By happenstance, Deputy Logan was dispatched. Cecelia related Michael's admission to CMH, his release and the return to him of his gun. After hearing about her visit to Michael, Logan told her "Go in the house. Lock the door. And if the man shows up, call the Sheriff's Department and we can pursue a trespass action against him." Logan later

told a civilian employee of the department the situation was potentially dangerous but there was nothing he could do.

The next day was Sunday, October 9. That afternoon, Michael came to the Karash residence. Cecelia heard his truck and ran to the telephone. Her mother saw Michael who smashed a locked sliding glass door and chased Mrs. Karash, beating her with a lead pipe. She broke free and ran to a neighbor for help. Michael then shot Cecelia twice. She died instantly and he turned the gun on himself. Mikie was then in the house and for eight hours afterwards, alone with the bodies of his parents while a sheriff's SWAT team surrounded the house. After firing tear gas, the SWAT team rushed the house and released Mikie to his grandfather. His grandmother, Isadora Karash, sued the County on his behalf, the court granted the county's nonsuit motion following the opening

statement and Isadora appeals.[1]

II

The court granted the nonsuit as to CMH liability on two grounds. The holding in Tarasoff v. Regents of University of California, supra, 17 Cal. 3d 425, was inapplicable. If applicable, Welfare and Institutions Code[2] section 5154, included within the Lanterman-Petris-Short Act (LPS Act), part 1 of division 5, Community Health Services, sections 5000-5550, immunized the County from liability for negligence of the psychiatrists. As to the deputy sheriff, the court concluded the opening statement did not

1/The parties stipulated the County was the sole defendant and Isadora as guardian the only remaining plaintiff and the negligence of the CMH employees and sheriff's deputies, if any, was attributable to the County. We thus ignore other party plaintiffs and defendants and look solely to the causes of action pleaded on Mikie's behalf.

2/All statutory references are to the Welfare and Institutions Code unless otherwise specified.

state facts sufficient to create the special relationship between the deputy and Cecelia essential to fix County liability under Williams v. State of California (1983) 34 Cal. 3d 18.

III

A nonsuit following an opening statement is not favored. (Greenwood v. Mooradian (1955) 137 Cal. App. 2d 532, 536-537.) Such nonsuit is warranted only when the court can conclude there will be no evidence sufficient substantially to support a judgment in favor of the plaintff. (Willis v. Gordon (1978) 20 Cal. 3d 629, 633.)

IV

We first look to County liability arising out of Michael's placement at CMH for evaluation and treatment and look to the duty horse before reviewing the immunity cart.

> "Once again the immunity cart has been placed before the duty horse. (See Davidson v. City of

Westminister (1982) 32 Cal. 3d 197....) We said in Davidson (pp. 201-202): 'Conceptually, the question of the applicability ofo a statutory immunity does not even arise until it is determined that a defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity.'" (Williams vs. State of California, supra 34 Cal. 3d 18 at p. 22.)

Tarasoff explains the duty of therapists who learn a patient in voluntary therapy presents a serious danger of violence to another:

"We shall explain that defendant therapists cannot escape liability merely because Tatiana herself was not their patient. When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the

circumstances." (Tarasoff v. Regents of University of California, supra, 17 Cal. 3d 425 at p. 431.

The opening statement as amplified by pretrial dialogue and during the nonsuit motion hearing makes clear Michael's dangerous propensities to harm Cecelia were known to her, her parents, the El Cajon police officers, Deputy Sheriff Logan, and CMH Doctors Blumenstin, Schorr and Pappas. The psychiatrists knew Michael was a walking time bomb. Other than telling him to see Dr. Olenik, the private practitioner, they did nothing. Michael departed CMH and returned to Ramona. The scene was set for the final act of this tragedy.

The County argues Tarasoff is inapplicable in the circumstances presented here. The Tarasoff killer, Prosenjit Poddar, was in voluntary therapy. Here, Michael, a person dangerous to others, was involuntarily committed to CMH for evaluation and treatment

under the LPS Act.[3]

We are unable to perceive any distinction in Tarasoff duty of psychiatrists who deal with patients in voluntary therapy and those who evaluate and treat persons involuntarily commmitted under the LPS Act. The psychiatrists in private practice, putting aside the Hippocratic Oath for the moment, who is consulted by a patient seeking voluntary therapy is free to accept or reject the engagement. A person seeking voluntariy therapy at a public facility may be rejected if financially able to retain services elsewhere (see 54 Ops.Cal.Atty.Gen. 65 (1971)) or is not suitable for care or treatment in the public facility (Section

3/For purposes of analyzing Tarasoff duty in an LPS Act setting, we shall assume without discussion Michael was involuntarily committed under section 5150. Later, we address this issue as a part of our section 5154 immunity analysis in which we conclude Michael's placement at CMH was indeed an involuntary commitment under section 5150.

6000). However, once a psychiatrist takes on a patient for therapy, whether voluntary or under LPS Act compulsion, the resulting special relationship supports affirmative duties on the psychiatrist for the benefit of third person (Tarasoff, supra at p. 436).

This appeal presents an even stronger case for the imposition of the duty. Michael was involuntarily committed because he was a danger to Cecelia. The CMH placement itself, in contrast to Poddar's voluntary therapy treatments in Tarasoff, affirms the probability Michael was a danger to others. We conclude the Tarasoff duty to warn third parties is applicable to CMH psychiatrists. We next consider whether the facts before us on this appeal negate that duty to warn.

Cecelia, more than anyone, knew Michael was a danger to her. A restraining order issued in the dissolution proceedings restraining him from approaching her. Deputy

sheriff Logan told her to lock the doors and call the sheriff if Michael approached her parents' residence. She knew about his September 6 trip from Ramona with the expressed intention of killing her only to have second thoughts and his subsequent placement at CMH. She was aware of the CMH release and the return of the gun to Michael.

The opening statement concedes these issues. Thus, while Dr. Pappas had an obligation to use reasonable care to protect an intended victim from the danger of serious violence her perceives in a person placed at CMH for evaluation and treatment, we are unable to determine in this case what is requried in the exercise of reasonable care to discharge that duty. To say a warning to Cecelia or others or notice to the police fulfills the duty is an exercise in futility. Every player in the drama was fully informed. To "take whatever other steps are reasonably

necessary under the circumstances" as advised by Tarasoff calls for a jury determination as to what the psychiatrist should be required to do.

The opening statement referred to expected psychiatric testimony listing several steps Dr. Pappas should have taken such as warning Cecelia never to be alone with Michael and always to be sure other adults were present. Direct contact with her would emphasize and underscore the peril Michael presented to her. A psychiatric label to the effect Michael was dangerous to her health might well have persuaded her to take extraordinary steps to secure her safety. We do not presume to catalogue the steps reasonably necessary for a psychiatrist to fulfill a Tarasoff duty on these facts and

conclude the question whether reasonable care was exercised should be left to the trier of fact.[4]

4/The Legislature apparently anticipated this dilemma in enacting Civil Code section 43.92, effective January 1, 1986, which provides a psychotherapist as defined in Evidence Code section 1010 has no monetary liability and a cause of action shall not arise as to the psychotherapist for failure to warn of and protect from a patient's violent behavior unless the patient communicates to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim. The duty to warn and to protect in that event is said to be discharged by the psychotherapist making reasonable efforts to communicate the threat to the victim and to a law enforcement agency. While the CMH doctors here are psychotherapists as defined in Evidence Code sectiono 1010, Civil Code sectiton 43.92, effective January 1, 1986, is not applicable to these events which occurred in 1983 and we do not consider it in our analysis.

V

Having examined the duty horse, we turn to the immunity cart.[5] Section 5154 of the LPS Act at times here relevant provided:

> "The professional person in charge of the facility providing 72-hour treatment and evaluation, his designee, and the peace officer responsible for the detainment of the person shall not be held civilly or criminally liable for any action by a person released at or before the end of 72 hours pursuant to this article."

5/Neither the court nor the parties addressed section 5113 immunity which concern articles 1, 1.5, 4, 4.5 and 6. Sections 5150-5154 are included in article 1. As section 5154 is specifically directed at releases of persons made pursuant to article 1, and tracks section 5113, we conclude section 5154 as effective at times relevant here is the immunity applicable to early release. Section 5113 was amended by urgency statute effective September 30, 1985. As amended, section 5113 applies to LPS criminal or civil liability except as provided in sections 5154, 5173, 5259.3 and 5306. Civil and criminal immunities for 72-hour or earlier release are now specified by section 5154 which was likewise amended as we later discuss in footnote 6, post.

The LPS Act must be construed to promote the intent of the Legislature, among other things, to end the inappropriate, indefinite and involutary commitment of mentally disordered persons, to provide prompt evaluation and treatment and to protect mentally disordered persons (Section 5001).

Chapter 2 of the act concerns involuntary commitment of persons in various categories, including those who are mentally disordered. Section 5150 provides for the placement at CMH of a person who, as a result of mental disordered, is a danger to others or to himself or is gravely disabled. The placement requires a written application.

During his opening statement, plaintiff's counsel exhibited to the jury a form filled out and signed by the El Cajon Police officers entitled "Involuntary Commitment." The form outlined the circumstances under which Michael's

condition at 3 a.m. was called to their attention and a statement of probable cause to believe, as a result of a mental disorder, he was a danger to others, all consistent with section 5150 requirements. The parties stipulated CMH was a properly designated facility providing 72-hour treatment and evaluation and the psychiatrists and clinical psycologist were facility employees.

However, plaintiff's counsel declined to stipulate those employees or any of them were a "designee" of the professional person in charge of CMH for purposes of Section 5154 immunity and further declined to stipulate Michael's placement at CMH was accomplished pursuant to the involuntary treatment provisions of chapter 2 and the detention procedures prescribed in Section 5150 of that chapter of the LPS Act.

Plaintiff's counsel argued the evidence would show Michael voluntarily committed

himself pursuant to section 5003. As the section 5154 immunity extended solely to involuntary commitments, he argued section 5154 was inapplicable and the County was not immune from liability arising out of Michael's activities after his release and he was a voluntarily committed person. Offered the opportunity, however, to adduce such statement, counsel candidly admitted the only evidence of a voluntary commitment was the inferences to be drawn by the jury from Michael's phone call to the California Highway Patrol seeking help, his willingness to go to the police station with the El Cajon officers, his admissions of intent to kill Cecelia and a statement in the police report to the effect he was voluntarily committed.

The court correctly concluded as a matter of law section 5003 did not authorize an LPS Act voluntary commitment and the proffered evidence was wholly insufficient to

sustain a finding Michael voluntarily committed himself under provisions other than those prescribed in the LPS Act.

Section 5003 is included in chapter 1, General Provisions, of the LPS Act.

> "Nothing in this part shall be construed in any way as limiting the right of any person to make voluntary application at any time to any public or private agency or practitioner for mental health services, either by direct application in person, or by referral from any other public or private agency or practitioner."

Section 5003 does not create a right to be admitted or treated at CMH. Section 5003 simply states the LPS Act does not limit the right of any person either personally or by way of referral to make a voluntary application to an agency for mental health services (see 54 Ops.Cal.Atty.Gen., supra, at p. 65). The LPS Act does not create or prescribe any procedures for a voluntary commitment. The LPS Act establishes procedures to end the inappropriate,

indefinite and involuntary commitment of mentally disordered persons and to provide prompt evaluation and treatment of such persons (Section 5001). Voluntary commitments simply are not covered by the LPS Act. Instead, voluntary commitments of mentally disordered persons are provided for in division 6, sections 6000-6008 of the Welfare and Institutions Code. Division 6 is not part of the LPS Act. Section 6004 provides the person in charge of a county psychiatric hospital may receive, care for or treat any person who voluntarily makes a written application for care, treatment or observation and who is a suitable person for the same and is competent to make the application. Unlike the person involuntarily committed to CMH under the LPS Act, a voluntary adult patient may leave the facility at any time by giving notice to any staff members of desire to leave and

completing normal departure procedures (Section 6005). Section 5003 saves from LPS Act preemption other services to voluntary commitments. Section 5003 itself has nothing to do with such voluntary commitments.

The evidence is wholly insufficient to support a finding Michael voluntarily committed himself under the provisions of law. Plaintiff's counsel exhibited the involuntary commitment form to the jury, read from it and admitted no other writing existed with respect to Michael's commitment. He told the jury the circumstances of Michael's detention by the El Cajon police, their questioning, the discovery of the gun and shells, their report, including references Michael was a danger to Cecelia, and the delivery of Michael to CMH and his placement there. Michael's placement at CMH by the El Cajon police officers tracked the processes prescribed by and was accomplished through

the involuntary procedures set out in section 5150. There is no evidence of a voluntary commitment.

VI

We turn to section 5154 as effective in 1983 and its applicability here.[6] Plaintiff's counsel declined to stipulate the CMH psychiatrists were a "designee" of the

6/While not controlling on this appeal, we note amendments to section 5154 by an urgency statute effective September 30, 1985, to cause civil and criminal immunity for 72-hour or earlier release track an amendment to section 5152 setting out procedures for and the designations of professional persons responsible for the early release of a person admitted to an LPS facility. This section 5152 amendment elaborates upon the designations of releasing authorities to include the psychiatrist directly responsible for the treatment and his or her personal observations and other professional persons authorized to release. Conflicts as to release between such person and the psychiatrist are resolved by the medical director or his or her designees who shall be a psychiatrist if the director is not a psychiatrist. Earlier release is authorized only if the psychiatrist making the final decision is satisfied, based on personal observation, the committed person no longer requires evaluation or treatment.

professional person in charge of CMH and he did not so characterize them in his opening statement.

Counsel have not cited and we have not found any cases dealing with Section 5154 immunity and the meaning of the phrase "professional person in charge of the facility" or the word "designee." Section 5151 provides if in "the judgment of the professional person in charge of the facility. . .or his designee" a person can receive services without detention, such person shall be provided evaluation and other services on a voluntary basis. Section 5152 as effective at times relevant here provides for the release of a detained person before the lapse of 72 hours if "in the opinion of the professional person in charge of the facility, or his designee" the person no longer requires evaluation or treatment. Section 5152.1 requires the person in charge

or his designee to notify the mental health director or his designee, and others, of the early release.

Michael was not detained at CMH for 72 hours. He was released September 7, some 33 hours after his placement there. In his opening statement, plaintiff's counsel told the jury Dr. Pappas saw Michael a second time:

> "Well, Dr. Pappas, next in order, sees Mr. Lowe for a second time after the psychological tests are performed. Dr. Pappas sees Mr. Lowe for about another fifteen minutes, comes face-to-face with the man, and he concludes that this is a nice fellow, that he's appreciative, that he's calm, that he wants to get back to work, so he puts him back out onto the street without taking any other affirmative steps toward protecting Cecelia Lowe from this walking time bomb."

He reiterated several times the fact Dr. Pappas released Michael. He told the jury the contents of the discharge report prepared by Dr. Pappas. Plaintiff's counsel

does not contest Michael's early release or complain about any CMH failure to follow prescribed early release procedures. In pretrial discussions between court and counsel, which the parties agreed could be considered by the court on the nonsuit motion, the facts included in the opening statement were extensively discussed and plaintiff's theory of County liability explained:

> "Dr. Pappas, the M.D. psychiatrist, then decided on his own to release Michael notwithstanding the conclusions of Dr. Schorr, the psychologist, because to him Michael appeared to be calm. There is a specific immunity for releasing or not releasing the patient; we agree with that. And that's really irrelevant because our case is not in any way based on when they released him. It is soley based on what duties they had under Tarasoff to take reasonable care to protect a victim, a known, identifiable victim, who was Cecelia, once they did release him."

The opening statement supplemented as requested by plaintiff's counsel by the

pretrial court-counsel dialogue concedes Michael's early release tracked section 5152 requirements, i.e., in the opinion of the professional person in charge of CMH, or his designee, Michael no longer required evaluation or treatment. It follows then, the admission Michael's release was proper requires the conclusion Dr. Pappas was acting as the professional person in charge or a designee of such person and entitled to section 5154 immunity.

VII

Isadora did not claim Dr. Blumenstein or Dr. Schorr were under a duty to warn Cecelia of her danger from Michael.[7] The opening statement fingers Dr. Pappas as the person chargeable with such duty. The other doctors

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7/Her opening brief on appeal, however, refers to Dr. Schorr's failure to warn Cecelia, and includes him with Dr. Pappas in her brief argument neither was a "designee."

were excluded as giving rise to any CMH liability on account of their activities. We thus examine the scope of the section 5154 immunity as to Dr. Pappas.

The section says Dr. Pappas "shall not be held civilly or criminally liable for any action by a person released at or before the end of 72 hours..." Isadora argues her claims against the County on Mikie's behalf are not based on Michael's post-release action, i.e., killing Cecelia; as in Tarasoff,, her claims are said to stem, from the failure to do anything to protect Cecelia from danger at Michael's hands.

Having defined therapist duty, Tarasoff considered therapy immunity under Government

Code provisions.[8] the court held Government Code section 820.2[9] did not immunize the the therapists and the university from liability for a failure to warn, pointing out Johnson v. State of California, (1968) 69 Cal.2d 782 limited section 820.2 immunity to the discretion exercised in the making of basic policy by legislative and executive basic policymakers to give them "sufficient breathing space in which to perform their

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8/ Inscrutably, Tarasoff grants section 5154 immunity to the campus police (deemed to be peace officers) who briefly detained and then released the killer Poddar. Apparently, the court considered the detainment was accomplished under section 5150 although the opinion is careful to exclude the LPS Act as a basis for its conclusions (see pp. 442-443, 450).

9/Government Code section 820.2 provides:

"Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."

vital policymaking functions." (Tarasoff, supra, at p. 445). The failure of the therapists to warn did not rise to that level. Government Code section 820.2 does not immunize CMH and the County in our case.

So far as failure of the therapists to confine Poddar was concerned, the court held them immune from liability under Government Code section 856. In reaching this conclusion, the court concluded the section 856 immunity extended to persons authorized to request or recommend confinement and was not limited to those persons authorized to commit mentally disordered persons under LPS Act section 5150.

> "The Lanterman-Petris-Short Act, in its extensive revision of the procedures for commitment of the mentally ill, eliminated any specific statutory reference to petitions by treating physicians, but it did not limit the authority of a therapist in government employ to request, recommend or initiate actions which may lead to commitment of his patient under the act. We

> believe that the language of section 856, which refers to any action in the course of employment and in accordance with any applicable enactment, protects the therapist who must undertake this delicate and difficult task. (See Fleming & Maximov, The Patient or His Victim: The Therapist's Dilemma (1974) 62 Cal.L.Rev. 1025, 1064.) Thus the scope of the immunity extends not only to the final determination to confine or not to confine the person for mental illness, but to all determinations involved in the process of the commitment. (Citation.)" California, supra, 17 Cal.3d 425 at p. 448, italics added.)

Government Code section 856 includes like immunity to public entities and public employees for any injury resulting from a determination "whether to parole, grant a leave of absence to, or release a person confined for mental illness or addiction." (Section 856, subd. (a)(3), italics added.) The language underlined above in our quotation from Tarasoff refers to the failure of the therapists to detain Poddar and to release him without "'notifying the parents

of (the victim) that their daughter was in grave danger from...Poddar.'" (Id. at p. 433.) We read Tarasoff as saying a failure to warn coupled with a failure to detain is immune under Government Code section 856. Here, the above-quoted Tarasoff language in the context of this case, the scope of the section 856 immunity extends not only to the final illness but also to all determinations involved in the process of release. Section 856 would appear to afford immunity from liability to CMH and the County. While this analysis of Tarasoff immunity suggests CMH and County immunity is afforded under Government Code section 856, we conclude section 5154 immunity applies.

We deal here with a specific statute creating immunity for the actions of an early-released person. Unlike the Government Code section 820.2 and 856 immunities discussed in Tarasoff, section 514 is narrow

and limited in scope and directed precisely at actions of persons who are released early.

As we have seen, the LPS Act seeks to end the inappropriate, indefinite and involuntary commitment of mentally disordered persons and others. A 72-hour involuntary placement for evaluation can be terminated and a detained person can be earlier released. The act thus assures a person properly detained the opportunity of early release. In recognition of the uncertainties implicit in the evaluation and treatment of mentally disordered persons involuntarily committed and the nature and character of their post-release activities, the act recognizes some early-released persons may offer harm to others. Balancing the straitjacket of CMH commitment and resultant assurance the committed person will not harm others beyond CMH walls against the aim of the act itself to end indefinite

confinements, we conclude the freedom of the committed person outweighs the shackles. The corollary to the early release and future conduct uncertainties is the immunity provided in section 5154 -- no liability for any actions by a person released at or before the end of 72 hours.

While Isadora's claim against the County rests on a CMH failure to warn or otherwise use reasonable care to protect Cecelia, that claim necessarily arises out of the murder by Michael, a post-release activity. As that action is immune under Section 5154, it follows that the claimed failure to warn is also immune. Free of CMH confinement, Michael was a gun pointed at Cecelia which fired the fatal shots. To immunize the shooting without including the activities which loaded the gun defeats the purposes of the act encouraging early release. The conduct of Dr. Pappas in the evaluation of

Michael and his earlier release is entitled to the section 5154 immunity to post-release activities.[10] The County shares that immunity. The nonsuit as to the CMH activities of the County was correct.

VIII

Isadora's complaint on Mikie's behalf also sought damages for Cecelia's death for failure of the sheriff's department to act with reasonable care in protecting Cecelia from harm. She claims the statements by Deputy Sheriff Logan while responding to the

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10/We appreciate our holding suggests voluntary commitments may be converted into LPS Act involuntary commitments to insure section 5154 immunity for failure to warn third persons of post-release potential of dangerous proclivities of released persons. The suggestion assumes an LPS Act commitment for improper persons without regard to the section 5150 placement procedures and an early release within the 72-hour period. While we need not now decide the issue, we doubt section 5154 immunity would be available to shield such commitment and early release from Tarasoff liability. Moreover, Civil Code section 43.92 arguably affords a defense for a failure to warn in voluntary commitment circumstances.

calls from Cecelia created a special relationship with the sheriff's department; a duty to protect Cecelia arose and the failure of the sheriff to carry out that duty imposes liability. (Williams v. State of California, supra, 34 Cal.3d 18 at p. 24) An officer who directs a person to follow him into an intersection may be liable for negligence when that person is struck by a car. (McCorkle v. City of Los Angeles, (1969) 70 Cal.2d 252.) When a deputy sheriff promised to warn a decedent upon release of a prisoner and failed to do so, the failure to warn constituted negligence giving rise to liability when the released prisoner killed the decedent. (Morgan v. County of Yuba, (1964) 230 Cal.App.2d 938).

Here, Deputy Sheriff Logan did not create a special relationship when he talked with Cecelia on the two occasions. The murder did not result from any failure to

investigate or to respond to the calls or from any promise or representation (Hartzler v. City of San Jose, (1975) 46 Cal.App.3d 6) or any delay in broadcasting an alert (Antique Arts Corp. v. City of Torrance, (1974) 39 Cal.App.3d 588) or failure to render aid (McCarthy v. Frost, (1973) 33 Cal.App.3d 872).

The deputy sheriff did not create the peril in which Cecelia found herself. He took no affirmative action which contributed to, increased, or changed the risk. He did not assume any responsibility to protect Cecelia and there is no evidence of any detrimental reliance by her on any of his statements. (Williams v. State of California, supra, 34 Cal.3d 18 at pp. 27-28.)

We conclude Deputy Sheriff Logan did not create or assume a special relationship as to Cecelia and the County incurred no liability

on these counts by reason of her death.

Judgment affirmed. County to have its costs on appeal.

CERTIFIED FOR PUBLICATION.

BUTLER, J.

I CONCUR:

WORK, J.

I respectfully dissent.

The majority would affirm a judgment of nonsuit following plaintiff Karash's opening statement. To do so in the light of the law surrounding and protecting a party from such a precipitous end to a judicial claim takes judicial bravery above and beyond the call of that ordinarily required of trial and appellate judges. The evidence and the applicable law does not authorize such drastic disposition of plaintiff's rights.

The motion for a nonsuit (Code Civ. Proc., Section 581c) is tantamount to a demurrer to the evidence (Reaugh v. Cudahy Packing Co., 189 Cal. 335, 339) by which a defendant can test the sufficiency of plaintiff's case before presenting its own. (Carson v. Facilities Development Co., 36 Cal. 3d 830, 838.) Such motion presents a question of law as to whether the evidence proffered before the trial court in support

of the plaintiff's case would justify judgment for plaintiff.

On appeal we are required to evaluate the plaintiff's evidence under the same rules governing the trial court. (Carson v. Facilities Development Co., supra at pp. 838-839.) The evidence must be accepted as true in the light most favorable to the plaintiff unless it is inheritently incredible. All conflicts must be resolved and reasonable inferences drawn in the plaintiff's favor.

Where as here, the nonsuit was based on the plaintiff's opening statement we are required to assume that plaintiff can prove all favorable facts set forth. (See Smith v. Roach, 53 Cal. App. 3d 893, 897-898, and cases cited therein.) The court, as it did here, may consider the opening statement as well as the matters that would probably come into evidence at the trial. A nonsuit on the opening statement is proper only when the

court concludes there will be no evidence which would support a judgment in favor of the plaintiff. In Willis v. Gordon, 20 Cal. 3d 629, 633, The Supreme Court held a nonsuit on the opening statement is warranted

> "'only when the court (can) conclude... from (all the facts and inferences) that ...there will be no evidence of sufficient substantiality to support a judgment in favor of the plaintiff(s).' (Citations.) It is well established that '(w)hether a particular inference can be drawn from certain evidence is a question of law but whether the inference shall be drawn, in any given case, is a question of fact....' (Citation."

Thus the issues squarely presented to the trial court and to this court is: Can it be said as a mater of law that the opening statement made by Karash's counsel is subject to no other reasonable construction other than that Karash failed to sustain a prima facia case of negligence upon the part of the defendant County?

Facts

Michael Ray Lowe (Michael) shot and killed his wife Cecelia Karash Lowe (Cecelia). Immediately thereafter he shot and killed himself. This murder-suicide occurred one month after Lowe's treatment at the County Mental Health Facility (CMH) by Dr. Martin Schorr and Dr. Socrates Pappas. The deaths occurred one day after Cecelia Lowe met with Sheriff's Deputy Jonathan Logan. This action is brought by decedent's son, Michael E. Lowe, two-years-old at the time and witness to the killings. He brings this action through his guardian ad litem seeking damages for wrongful death and negligent infliction of emotional distress.

I

The first issue presented is whether the therapists at the County Mental Health owed but failed to discharge their duty to use reasonable care to protect Cecelia from the

murdering potential of their patient Michael. (Tarasoff v. Regents of University of California, 17 Cal. 3d 425.) Plaintiffs contend that Tarasoff imposes such a duty which was not relieved by the fact that Cecelia was aware of her husband's violent propensities; nor are they protected by the immunity statutes from liability. The second issue involves the liability of Deputy Sheriff Logan. Did he owe a duty to act with reasonable care in responding to Cecelia Lowe's request for assistance. (Williams v. State of California 34 Cal. 3d 18.)

Concerning the Tarasoff issue, the representations before the trial court detailed the relationship between Michael and the hospital employee/therapist(s). The proferred evidence is summarized as follows: The admitting psychiatrist at CMH observed that Michael was shaking and had been drinking. He requested in writing that the evaluating therapist investigate and rule out

the explosive and paranoid personality. Michael was later seen by Dr. Pappas, a staff psychiatrist, for an interview lasting approximately 15 minutes. Pappas ordered extensive testing by Dr. Shorr, a clinical psychologist. Neither Pappas nor Shorr were ever designated as being in charge by Dr. Higgins, the professional person in charge at CMH. Shorr's examination indicated a calm patient. A battery of tests were conducted. The Rohrshak test revealed an inwardly angry explosive paranoid personality, poor self control, emotional immaturity orientation compatable with a latent type schizophrenia. Dr. Shorr concluded Michael was a dangerous person, comparable to a walking time bomb. Alcohol and other stresses could well be the fuse igniting the explosion.

Despite these findings, Shorr did not examine the police report revealing Michael''s threat towards his wife and a dog

shooting incident. He simply recorded the test results and passed them on to Dr. Pappas with his conclusions. Dr. Pappas and Dr. Shorr did not discuss the results of these tests, nor did Dr. Shorr consult with the other members of his team to assure Michael received proper treatment, nor did Dr. Shorr take any protective steps to insure the safety of Cecelia or the child. He did not contact authorities nor did he attempt to advise Cecelia of Michael's dangers.

After these hours of psychological testing by Dr. Shorr, Dr. Pappas again met with Michael. Dr. Pappas had before him the results of this testing and knew from the report of the El Cajon Police that his patient had threatened to shoot and kill his wife and himself the day before. He knew Michael's history of marital and drinking problems and abusiveness to his wife; he knew Michael, in asking for psychological help,

had been found crying beside his truck with weapons and ammunition inside. Dr. Pappas was also aware of the dog shooting incident. After a 15 minute interview, Pappas observed Michael to be calm and appreciative and eager to return to work. He thereupon released him from the CMH. At no time thereafter did Dr. Pappas or Dr. Shorr contact Cecelia in any way in order to warn her. Dr. Pappas attempted to contact Cecelia to warn here that Michael was at CMH but was unable to telephone her; no further attempts were made. Michael was advised to proceed with private psychological care, but neither Dr. Pappas nor anyone else at CMH followed up to determine whether this was done.

Further evidence was proferred from Dr. Thomas Rusk, plaintiff's psychiatric expert. He was of the opinion the making of no attempt to counsel Cecelia on how to handle Michael's personality and his violent

behavior, not to establish therapy for Cecelia, not to warn her to limit contact with him, and never to be alone with him, and not insuring that Michael was attending therapy on his own, fell below the standard of care, i.e., consituted negligence.

Tarasoff v. Regents of University of California, supra, 17 Cal. 3d at p. 431, explicitly sets forth the duty in a case such as this:

> "When a therapist determines...that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever steps are reasonably necessary under the circumstances." (Emphasis added.)

To say there is not a Tarasoff duty under the facts as outlined in the opening statement of

plaintiff is to ignore specific realities we are required by law to accept as fact.

It is argued since the Tarasoff case did not involve a facility established pursuant to the Lantermann-Petris-Short Act (L.P.S.), therefore the rule of Tarasoff is not applicable. Whether this was an L.P.S. confinement does not affect the determination of whether these doctors owed a duty under Tarasoff. The duty language of Tarasoff is not so limited. (Tarasoff, supra at p. 431). (Mavroudis v. Superior Court 102 Cal. App. 3d 594, 599-600.) to impose a standard of care on a CMH hospital and its therapists --other than that imposed by Tarasoff -- would undermine the important societal goals which were illustrated and expressed in Tarasoff.

II

The majority determine as a matter of law that there was a statutory immunity protecting Drs. Shorr and Pappas. This may

be true as a matter of fact; but such a conclusion doesn't derive as a reasonable inference from the opening statement of the plaintiff. Instead, plaintiff presented a picture which would allow for imposition of liability and preclude the application of the statutory immunities. The majority assumes without discussion Michael was "involuntarily committed under section 5150" and later discusses and analyzes the issue on the unfounded premise the commitment was in truth and in fact an involuntary commitment under Welfare and Institutions Code section 5150. Such a conclusion simply begs a most critical factual issue in this case. I conclude that whether Michael voluntarily submitted to treatment at CMH or was an involuntary transfer is a question of fact for a jury, not a basis for the granting of nonsuit.

1/All statutory references are to the Welfare and Institutions Code unless otherwise specified.

The trial court's reasoning that without immunity "you couldn't get people to do these jobs if they were going to be responsible for whatever happened once these people left or whatever" appear to be in violation of the Tarasoff court determined where it expressly balanced the competing policies in favor of protecting society. (Tarasoff, supra, at p. 440.) Broad immunity that would shield blatant negligent acts or omissions is contrary to very strong public policy. The Supreme Court has stated "The 1963 Torts Claim Act" did not alter the basic teaching of Muskopf v. Corning Hospital Dist., 55 Cal. 2d 211, 219. When there is negligence the rule is liability, immunity is the exception. (Johnson v. State of California, 69 Cal.2d 782, 798.) Thus,

> "(u)nless the Legislature has clearly provided for immunity, the important societal goal of compensating injured parties for damages caused by willful or

> negligent-acts must prevail." (Ramos v. County of Madera, 4 Cal. 3d 685, 692.)

The Supreme Court in Lopez v. Southern Cal. Rapid Transit Dist., 40 Cal. 3d 780, 793, recently reiterated this basic principle stating:

> "We have also held that, 'in governmental tort cases "the rule is liability, immunity the exception,..." Unless the Legislature has clearly provided for immunity, the important societal goals of compensating injured parties for damages caused by the willful or negligent acts must prevail.' (Romos v. County of Madera, ...)"

We confront here proferred direct and circumstantial evidence of negligence upon the part of the CMH doctors who say there is immunity from liability in this circumstance where a patient committed to CMH, pursuant to L.P.S., informed his evaluating psychiatrist that at a specific place and time he was going to kill his wife with a particular weapon. The doctors assert thereafter the

therapist could discharge the patient without further obligation to warn or to use reasonable care to protect the known victim. Such a view simply does not make sense in this latter part of the 20th Century. The "king can do no wrong" concept is long dead. The Tarasoff case, while not involving factually a public L.P.S. hospital, yet discusses at length dangerous patients and cites cases involving professionals or hospitals connected with public entities. (See Harris, Tort Liability Psychotherapist (1978) 8 U.S.F. L.Rev. 405, 525.)

III

The critical question is in the words of Lopez, supra, whether the Legislature has clearly provided for immunity. Factually, there is no doubt the therapists at CMH owed a duty of care to Cecelia. They would be liable absent some clear grant of statutory immunity. (See also Davidson v. City of

Westminster, 32 Cal. 3d 197, and Johnson v. County of Los Angeles, 143 Cal. App. 3d 298, 307.)

The County's motion for nonsuit was based in part upon the statutory immunities provided by Government Code section 8585.8 and section 5154. By neither of these statutes has the Legislature "clearly" provided for immunity as a matter of law in these circumstances. Finally, as will be shown, as a matter of fact, section 5154 does not apply in this case because Michael voluntarily submitted himself for treatment at CMH. Here, at a minimum, the question of voluntary versus involuntary treatment is in issue as a question of fact to go to a jury.

2/It may be conceded that there are factual conflicts here as to what Michael said and what the police officer did and how the medical facility responded, that it is clear section 5154 provides immunity for the professional person in charge of the facility or his designee in the instances of involuntary treatment only. Whether Drs. Papps and Shorr were "designees" does not appear in the evidence.

Government Code section 855.8, subdivision (a), grants immunity from tort liabilty to public entities and their employees for injuries resulting from a diagnosis or failure to diagnose mental illness or addiction in a patient and for failing to prescribe for mental illness. Mental illness includes "any condition for which a person may be detained, cared for, or treated in a mental institution," or a facility established by the County pursuant to Chapter 2 of L.P.S. (Gov. Code, Section 854.4.) This statutory immunity covers specific acts and omissions by public employees for failure to diagnose and failure to prescribe. (see Van Alstyne, Cal. Government Tort Liability Practice (1980) Section 4.48, p. 399.) Clearly, Government Code section 855.8, subidivison (a), would protect public entities from errors in judgment as to whether a patient was mentally

ill and therefore should be confined, or whether the patient is not mentally ill and should not be confined. Here, plaintiffs are not suing because of the decision to confine or not to confine, nor for any decision regarding to whether Michael was mentally ill. In Fish v. Regents of Univ. of Cal., 246 Cal. App. 2d 327, the immunity section was applied to the decision of the physician that a patient be confined for psychiatric observation. Where there has been faulty diagnosis resulting the release of a mental patient as in Hernandez v. State of California, 11 Cal. App. 3d 895, the immunity defense prevails.

In contrast, the Tarasoff duty does not focus upon the therapists' failure to diagnose, rather upon the dangerousness of the patient and the failure to warn. Dangerousness is not necessarily equated with mental illness. Finally, the immunity

provided by Government Code section 855.8 was not raised or discussed in Tarasoff. The case did not factually involve a public entity and public employee. Thus, whether Drs. Shorr and Pappas failed to diagnose Michael correctly is not pertinent in this cause of action.

If it be assumed arguendo that the distinction between diagnosing mental illness and determining dangerousness is rejected, nevertheless Government Code section 855.8, subdivisions (c) and (d), provides specific exceptions to this grant of immunity. These parts state that this section does not exempt a public employee from liability from injuries arising from negligence or other wrongful acts while "prescribing" treatment or in "administering" prescribed treatments. The Tarasoff liability position falls squarely within these exceptions. (See Van Alstyne, supra, at p. 400.) Clearly, under

Government Code section 855.8, there would be no immunity to the County of San Diego who would be vicariously liable for the therapists' negligence under Government Code sections 855.8 and 815.2. As was said in Guess v. State of California, 96 Cal. App. 3d 111, 119, "under sections 856, 855.8 and 815.2 public entities are vicariously liable for such wrongs," i.e., injuries proximately caused by the negligence or wrongful acts of public employees.

IV

Nor is section 5154 a shield for these therapists at CMH from liability. The trial court in granting a motion for nonsuit stated that all professionals at CMH were automatically "designees" of the professional person in charge and therefore under section 5154. The legislative history of 5154 indicates that it was designed to protect and immunize the policy makers of a governmental

entity from liability.

Section 5154 specifically provides immunity from liability for any action of a patient released from a 72 hour evaluation facility for "the professional person in charge of the facility" or "his or her designee." This language was a marked change from the language used in former section 5047 and 5551, the apparent precursors of sections 5150 through 5154 of the present code. The derivation of current 5154 is both former sections 5157 and 5551. The former sections addressed the procedure for examination and evaluation of the alleged mentally ill person. Former sections 5047 and 5551 provided:

> "when a petition (for a mental examination) is filed by any such person, neither the person making or filing the petition, nor his superiors, nor the department, hospital, or institution to which he was attached nor any of its employees shall be rendered liable..." (Emphasis added.)

Clearly, when the Legislature sought to protect a broad spectrum of persons it specifically listed "employees" of the facilty. In contrast, the Legislature in revising the section limited the immunity provided by Section 5154 by referring only to the "professional person in charge" or "his or her designee."

Furthermore, that the Legislature specifically sought to limit immunity to those policy-making employees the head of the institution is supported by the history of section 5150 through 5154. As originally presented to the Assembly, section 5151 declared that a person may be provided evaluation and treatment without being detained "in the judgment of the individuals providing evaluation." This language was replaced with "in the judgment of the professional person in charge of the facility

was added the limiting language was included

in that statute as well. It is abundantly clear the Legislature opted for language which granted restricted immunity to those in a policymaking position. It should be further noted that under the L.P.S. where the Legislature has intended an immunity to be all inclusive the statute was written as: "no person shall be held liable" or "any individual." (See former section 5203 and current section 5203.) Thus, it is difficult or impossible to conclude that the "designee" is the individual doctor providing evaluation. At minimum there is an ambiguity in the statutes. Rambs, supra, and Logan, supra holds unless the Legislature has clearly provided for immunity, liability must prevail. Furthermore, these interpretations favoring liability of the individual doctor/non-designee are in keeping with the legislative acts and purposes in providing immunity for discretionary acts and omissions

under the Torts Claim Act of 1963, but allowing liability for ministerial or nondiscretionary functions. (Gov. Code, Section 820.2; Van Alystyne, supra, at pp. 115, 139.) Thus, section 5154 should be interpreted in harmony with the Torts Claims Act of 1963 and prior judicial interpretations of this particular grant of governmental immunity.

From the foregoing analysis of the statutes in question, it is clear that the immunity provided by section 5154 does not extend to Drs. Pappas and Shorr. The doctor in charge at CMH at the time of Michael's admission was one Dr. Higgins. There is no evidence that Dr. Higgins designated either Pappas or Shorr as the person in charge of the facility or that they were in line for such designation. Dr. Pappas was a staff psychiatrist whose function was to evaluate and determine treatment. Dr. Shorr was a

treating psychologist. Neither were in a position to make discretionary decisions. Their immunity would not enhance the obvious legislature purposes to be found in section 5154.

V

Assuming arguendo section 5154 does apply to all professionals working in an L.P.S. facility, it is clear this would bar recovery only if treatment was involuntary. The majority concedes there exists no statutory immunity for public entities or public employees when the patient has voluntarily admitted himself for treatment in a 72-hour evaluation facility.

Here, the evidence when viewed most favorably to the plaintiff shows a voluntary commitment. The form used by the El Cajon Police to transfer Michael for treatment to CMH was a standard from application for involuntary detainment pursuant to section

5150. However, the fact that the police officers used such a form is not irrefutable proof the admission was involuntary. There is considerable evidence to the contrary showing Michael voluntarily admitted himself to CMH. Michael made the initial contact with the police on September 6, 1977, claiming he was on his way to kill his wife; wanting to speak with a psychiatrist. Most significant is the report of the El Cajon police officer who took him into custody who stated in his report: "The subject was then asked if he would voluntarily commit himself to CMH for observation and replied that he would be willing to talk with a psychiatrist at that location. He voluntarily accompanied Officer Hill to the El Cajon Police Department where this report and a voluntarily commitment form were prepared." (Emphasis added.) The (5150) form used by the police officer on its face would suggest

that this was an involuntary commitment therefore arguably subject to whatever immunity is granted under section 5154. However, upon trial evidentiary matters should be produced to show why the officer used this form. No other form is available for a voluntary commitment? The officers wrote that it was a voluntary commitment in their reports; they nonetheless used the involuntary transfer form. It is reasonable to infer from the police report that the officer thought he filled out a voluntary commitment form.

There is evidence that a separate form at CMH (a voluntary commitment form) was not signed by Michael. Once again, there may be a variety of reasons advanced for this not being signed: clerical error; misunderstanding; Michael's refusal to sign for reasons unconnected with his volunteering for treatment.

In sum, the point is that neither the 5154 department involuntary form prepared by the police or the unsigned CMH voluntary form is at all consistent with Michael's clear and unequivocal request for help and voluntarily entering the hospital. He called the CHP for help; he volunteered to accompany the El Cajon police officers; he was cooperative with the CMH staff; in fact, he was so cooperative and cordial that he lured Dr. Pappas into believing he was not a danger. In face of this evidence, the trial court determined as a matter of law this was an involuntary treatment. This was error. This was a factual decision that must be left to a jury.

VI

Finally, to interpret the Welfare and Institutions Code section as the County would desire is to immediately raise the specter of a denial of equal protection. If the County

is correct, under LPS, there exist two separate classes of Tarasoff tort victims. First, those who are maimed or killed by a voluntarily treated ex-patient who had been released on their own; and secondly, those who have been maimed or killed by an involuntarily treated ex-patient who had been released on his own. The former can sue but the latter cannot. Thus, the question is, from a constitutional point of view, what rational relationship is there between having two such separate classes of tort victims and any legitimate state interest.

Equal protection clauses require "that persons under like circumstances be given equal protection and security in the enjoyment of personal and civil rights, the acquisition and enjoyment of property, the enforcement of contracts and the prevention and redress of wrongs,..." (5 Witkin, Summary of Cal. Law (8th ed. 1974)

Constitutional Law, Section 336, p. 3630). Once a person is released from CMH who has obtained voluntary treatment on his own, he becomes an ex-patient whether he was initially treated voluntarily or involuntarily. (See Section 5152.) And the County has the same degree of control or lack of control over each type of ex-patient who is released on his own. Thus, any one potential tort victim is in precisely the same position as any other potential tort victim whether the ex-patient tortfeasor is one class or another. Thus, there exists no basis in reason for distinguishing the two classes.

In Brown v. Merlo, 8 Cal.3d 855, the California Supreme Court was faced with the problem of tort immunity by reason of the guest statute. The statute was written to protect the hospitality of the host driver, to prevent collusion between the host driver

and the guest passenger. The Supreme Court invalidated this statute saying in summary:

> "We have concluded that the classification which the guest statute creates between those denied and those permitted recovery for negligently inflicted injuries do not bear a substantial and rational relation to the statute's purposes of protecting the hospitality of the host-driver and of preventing collusive lawsuits. We therefore hold that, as applied to a negligently injured guest, the guest statute violates the equal protection guarantees of the California and United States Constitutions." (Id. at p. 882.)12

VII

The Williams Issue

The trial court held that Deputy Sheriff Jonathan Logan owed no duty of care to Cecelia. The rule is that a person ordinarily owes no duty to come to the aid of another unless there is a relationship between the two of them that gives rise to the duty to act. Thus, the issue here is whether factually it could be reasonably

inferred by the opening statement here that Logan did owe a duty to Cecelia.

When the government, through its agents, voluntarily assume the protective duty toward a member of the public and undertakes action on behalf of that member and thereby inducing reliance, it is held to the same standard of care as a private individual. (Williams v. State of California, 34 Cal.3d 18, 24; Lopez v. Southern California Rapid Transit Dist., 40 Cal.3d 780, 799; see Note, Police Liability for Negligent Failure to Prevent Crime (1980-81) 94 Harv.L.Rev. 821, 824.) The requirements of a special relationship before such duty arises applies in areas of law enforcement and police activities. (See Hartzler v. City of San Jose, 46 Cal.App.3d 6, 9, 10.) In Williams, supra, our Supreme Court established criteria to determine whether a special relationship existed between a police officer and a citizen --

thereby creating a duty of care. The requisite special relationship can be found (1) if the officer took any affirmative action which contributed to, increased or changed the risk which would have otherwise existed, or (2) the officers voluntarily assumed responsibility to protect the individual, or (3) the individual detrimentally relied on the conduct of the officer in statements made by him which induced a false sense of security thereby worsening the individuals position. (Williams, supra, at pp. 27-28.) Without question, the first and third criteria set forth above in Williams are satisfied. Deputy Sheriff Logan responded to Cecelia's complaint and informed her that there was nothing he could do about Michael's forcing her to submit to sexual intercourse. However, Logan recognized the potential danger imposed by Michael and he took the

affirmative step of advising Cecelia to stay at her parent's home; to lock the doors; call the sheriff's department if Michael showed up. This increased the risk it may be argued factually. The Karash resident was perhaps the most dangerous place for her to remain. Once Logan affirmatively acted to inform Cecelia how to protect herself, he had the duty to use care in providing such information. (See Mann v. State of California, 70 Cal.App.3d 773, 780.) He should have told her to secret herself in a place where Michael could not find her until she had time to file charges for false imprisonment, etc.

Further, Cecelia relies to her detriment on Logan's satement that she should stay at the Karash home and lock the doors and call the sheriff's department if Michael arrived. This advise created a false sense of security it may be argued. A professional law officer

was giving this advice. By advising her, he, the expert, lulled Cecelia into a false sense of security that she would be safe thereby causing her to forego seeking other forms of protection. Cecelia was in fact where Logan avised her to be when her husband killed her the next day.

Cases relied upon to reject the existence of special relationship by the County are distinguishable. In Davidson v. City of Westminister, supra, 32 Cal.3d 197, the injured party was totally unaware that the police officers were present conducting surveillance. The victim could not have relied upn the officer's protection. Thus, there is no officer-induced reliance to be claimed. However, the Davidson court did emphasize that a special relationshp could be found where the injured party depended upon the expertise and training of the police officer. (Id. at p. 207.) In Mann v. State

of California, supra, the police officer investigating a traffic accident took affirmative steps to provide assistance lulling the parties into a false sense of security to their detriment.

The plaintiffs have proffered (through an expert retired Sheriff's Sergeant Carl) evidence that the following advice should have been given: "Don't stay at your parents'home because he can find you there. Go somewhere where he doesn't know anything about. Secrete yourself. Then go to the D.A. on Monday and ask him to file a criminal complaint." Whether Cecelia would have been killed later after having filed a criminal complaint is not relevant to the fact that she was killed on Sunday, the day following the improper advice by the police officer. The foregoing facts should have been presented to a jury in order to determine whether they fit within the requirements of

the Williams rules. Finally, Logan had placed Cecelia in a dangerous position by reason of reliance upon his advice.

No rules of statutory immunity exonerate his negligence. (See Mann v. State of California, supra, 70 Cal.App.3d at pp. 778-779.) There is no factual allegation to bring this case within a "failure to provide police protection" which is immunized under section 845 as a legitimate policy decision. Rather, this is a case involving a charge of negligence in the performance of duty by Deputy Sheriff Logan. Thus, as said in Mann, the police protection immunity does not apply. (Id. at p. 779.)

For each of the foregoing reasons, I would reverse anad remand for further proceedings in the trial of this matter.

CERTIFIED FOR PUBLICATION.

STANIFORTH, Acting P.J.

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL

4th District, Division 1, No. D001950

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

KARASH, etc.

v.

COUNTY OF SAN DIEGO

Petition for review DENIED.

Bird, C.J., is of the opinion the petition should be granted.

BIRD

Chief Justice

APPENDIX "B"

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ISADORA KARASH as Guardian ad Litem for MICHAEL E. LOWE, a minor,

Plaintiff and Appellant,

vs.

COUNTY OF SAN DIEGO,

Defendant and Respondent.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

DAN ZEIDMAN, being first duly sworn, deposes and says that he is a member of the Bar of the Supreme Court of the United States; that on January 17, 1987, the Petition for Writ of Certiorari in the above-entitled case was deposited in a United States post office mail box located in San Diego County, California, with priority, postage prepaid, properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing

said petition, and with an additional copy being mailed to the following:

Court of Appeal of the
State of California
1350 Front Street
San Diego, CA 92101

San Diego Superior Court
220 West Broadway
San Diego, CA 92101

Honorable Gerald Lewis
Court of Appeal of the
State of California
1350 Front Street
San Diego, CA 92101

Office of the County Counsel
1600 Pacific Highway, Room 355
San Diego, CA 92101

California Supreme Court
3580 Wilshire Blvd.
Room 213
Los Angeles, CA 90010

Dated at San Diego County, California, this 17 day of January, 1987.

DAN ZEIDMAN, Affiant

Subscribed and Sworn to Before me this 17 day of January, 1987

Debra Lynn Rasner
Notary Public in and for said
County and State

OFFICIAL SEAL
DEBRA LYNN RASNER
NOTARY PUBLIC - CALIFORNIA
SAN DIEGO COUNTY
My comm. expires DEC 18, 1987

Supreme Court, U.S.
FILED
MAR 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1205

In The

Supreme Court of the United States

October Term, 1986

ISADORA KARASH as Guardian ad Litem for Michael E. Lowe, a minor,

Petitioner,

v.

COUNTY OF SAN DIEGO,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division One

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT 2

ARGUMENT 4

PETITIONER'S AUTHORITIES DISTINGUISHED 8

CONCLUSION 9

CONCURRING OPINION
Court of Appeal for the State of California, entered July 18, 1986 ..... App. 1

TABLE OF AUTHORITIES

Pages

CASES

Baxstrom v. Herold, 383 U.S. 107 (1966) 4

County of Los Angeles v. Superior Court, 62 Cal.2d 839 (1965) 6

Humphrey v. Cady, 405 U.S. 504 (1972) 4

Jackson v. Indiana, 406 U.S. 715 (1972) 4

Jones v. United States, 463 U.S. 354 (1983) 4

Levy v. Louisiana, 391 U.S. 68 (1968) 4, 8

Martinez v. California, 444 U.S. 277 (1980) 4, 6, 7, 9

Tarasoff v. Regents of University of California, 17 Cal.3d 425 (1976) 8, 9

Williamson v. Lee Optical Co., 348 U.S. 483 (1954) 4

STATUTES—CALIFORNIA

Government Code Section 845.8(a) 6

Government Code Section 856 ..... 2, 8

Welfare and Institutions Code Section 5100 5

Welfare and Institutions Code Section 5154 ..... 2, 8

OTHER

Rules of Supreme Court Rule 17(1)(c) 4, 6

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On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division One

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To The Honorable William H. Rehnquist, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Respondent COUNTY OF SAN DIEGO, a public entity and a political subdivision of the State of California, opposes the petition for a Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division One, and files this Brief setting forth the reasons for its opposition.[1]

[1]Rule 28.1 of the Rules of the Supreme Court is not applicable.

SUMMARY OF ARGUMENT

Petitioner bases her application to this Honorable Court for a Writ of Certiorari on the alleged unconstitutionality of two California statutes. Petitioner claims that application of the provisions of California Welfare and Institutions Code section 5154[2] and California Government Code section 856[3] violate petitioner's rights under the

---

[2]California Welfare and Institutions Code section 5154 at the time of the occurrence provided:

> "The professional person in charge of the facility providing 72-hour treatment and evaluation, his designee, and the peace officer responsible for the detainment of the person shall not be held civilly or criminally liable for any action by a person released at or before the end of 72 hours pursuant to this article."

[3]California Government Code section 856 at all times provided:

> "(a) Neither a public entity nor a public employee acting within the scope of his employment is liable for any injury resulting from determining in accordance with any applicable enactment:
>
> "(1) Whether to confine a person for mental illness or addiction.
>
> "(2) The terms and conditions of confinement for mental illness or addiction.
>
> "(3) Whether to parole, grant a leave of absence to, or release a person confined for mental illness or addiction.
>
> "(b) A public employee is not liable for carrying out with due care a determination described in subdivision (a).
>
> "(c) Nothing in this section exonerates a public employee from liability for injury proximately caused by his negligent or wrongful act or omission in carrying out or failing to carry out:
>
> "(1) A determination to confine or not to confine a person for mental illness or addiction.

(Continued on following page)

Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Petitioner claims these statutes unfairly immunize the County of San Diego from liability for the death of petitioner's decedent at the hands of a patient released following involuntary commitment to respondent's mental health facility. Petitioner contends the statutes preclude any recovery from respondent only because the patient's commitment for treatment was involuntary, when the immunity would not have been available had the patient been treated on a voluntary basis.

However, application of the statutes only to involuntarily committed patients is neither unreasonable nor arbitrary. There is no definite period of commitment for voluntary patients, who may terminate treatment at any time. The release of an involuntary patient pursuant to the exercise of discretion of the treating physician before the end of the involuntary commitment period would otherwise on the proper facts, result in liability to victims of the released mental health patient. The statutory immunities provided to public entities and their employees for determinations of this nature bear a rational relationship to proper legislative objectives, i.e., to end the inappropriate, indefinite and involuntary commitment of mentally disordered persons.

Petitioner has failed to set forth the reasons why review on the writ should be granted, according to the con-

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(Continued from previous page)

"(2) The terms or conditions of confinement of a person for mental illness or addiction.

"(3) A determination to parole, grant a leave of absence to, or release a person confined for mental illness or addiction."

siderations provided at Rule 17(1)(c) of the Rules of the Supreme Court. This Court has already considered and rejected a Fourteenth Amendment challenge to a similar California statute immunizing the government from liability for decisions to release prisoners on parole.

For these reasons this Court should deny the Petition for a Writ of Certiorari to issue to the state court of appeal.

———o———

ARGUMENT

This Court has applied a rational relationship test to each previous equal protection challenge involving involuntary commitment classifications. (*Jackson v. Indiana,* 406 U.S. 715 (1972); *Humphrey v. Cady,* 405 U.S. 504 (1972); *Baxstrom v. Herold,* 383 U.S. 107 (1966); see also *Jones v. United States,* 463 U.S. 354, 362, fn. 10 (1983).

Moreover, great latitude is given to state legislatures in determining classifications involving social and economic legislation. (*Levy v. Louisiana,* 391 U.S. 68 (1968), citing *Williamson v. Lee Optical Co.,* 348 U.S. 483, 487-489 (1954).) Unless wholly arbitrary or irrational, the State of California, in enacting legislation controlling governmental tort liability, has broad powers paramount to any discernible federal interest. (*Martinez v. California,* 444 U.S. 277, 282 (1980).) The statutes challenged by petitioner herein deal not only with services for the most basic of social needs but also control the government's tort liability in the providing of such services. The legislative wisdom behind the immunities is therefore entitled to great deference.

Unlike voluntary patients, involuntarily committed patients cannot simply walk away from the mental health facility. An exercise of discretion by the treating physician is necessary for such patients to leave a facility before the end of the 72-hour commitment. If that patient, following an early release from a mental health facility, were to cause injury to another, the facility and/or physician making the determination to release the patient could be exposed to liability. Absent the legislative grant of immunity to the persons and facilities exercising such discretion, no involuntarily committed patient would ever be released before the end of the definite period of commitment, regardless of how unnecessary such continued commitment might be. Such unjustified involuntary confinement would be directly contrary to the expressed legislative intent to "end the inappropriate, indefinite, and involuntary commitment of mentally disordered persons."[4] Special problems of diagnosis and treatment in the field of mental illness, combined with the problems of excessive patient load in public mental institutions that must take all patients committed to them, necessitate legislation to immunize public entities and employees from liability for determinations

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[4]California Welfare and Institutions Code section 5001 provides in part:

"The provisions of this part shall be construed to promote the legislative intent as follows:

"(a) To end the inappropriate, indefinite, and involuntary commitment of mental disordered persons, developmentally disabled persons, and persons impaired by chronic alcoholism, and to eliminate legal disabilities;

"(b) To provide prompt evaluation and treatment of persons with serious mental disorders or impaired by chronic alcoholism."

made in accordance with the policies and purposes of civilized and humane treatment of mentally disordered persons. (See *County of Los Angeles v. Superior Court,* 62 Cal.2d 839, 846 (1965).) The legislative wisdom of immunizing public employees and entities from liability under such conditions deserves great deference.

Petitioner has failed to specify why this Court should grant review on the petition, according to Rule 17(1)(c) of the Rules of the Supreme Court. No important question of federal law remains unresolved and no federal question has been decided in a way in conflict with applicable decisions of this Court. In fact, this Court recently rejected a similar challenge to a similar statute. In *Martinez v. State of California, supra,* 444 U.S. 277, this Court agreed that a statute immunizing the State of California from liability for decisions to release prisoners on parole did not violate the due process clause of the Fourteenth Amendment. That case arose out of the murder of a 15-year old girl by a paroled mentally disordered sex offender. The girl's parents sued the State of California claiming that the state officials responsible for the parole-release decision should be liable in damages for the death of their daughter. The California Supreme Court affirmed an order sustaining the State's demurrer to the complaint, based on the provisions of California Government Code section 845.8(a), which immunized the State of California for such a determination.[5]

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[5]California Government Code section 845.8(a) provided:

"Neither a public entity nor a public employee is liable for:

(Continued on following page)

As against the Fourteenth Amendment due process challenge, this Court affirmed, stating:

> "But even if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernable federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational.
>
> "We have no difficulty in accepting California's conclusion that there 'is a rational relationship between the State's purposes and the statute.' (Footnote omitted.) In fashioning state policy in a 'practical and troublesome area' like this, . . . the California Legislature could reasonably conclude that judicial review of a parole officer's decisions 'would inevitably inhibit the exercise of discretion,' (citation omitted). That inhibiting effect could impair the State's ability to implement a parole program designed to promote rehabilitation of inmates as well as security within prison walls by holding out a promise of potential rewards. Whether one agrees or disagrees with California's decision to provide absolute immunity for parole officials in a case of this kind, one cannot deny that it rationally furthers a policy that reasonable lawmakers may favor. As federal judges, we have no authority to pass judgment on the wisdom of the underlying policy determination. We therefore find no merit in the contention that the State's immunity statute is unconstitutional when applied to defeat a tort claim arising under state law." (*Martinez v. State of California, supra,* 444 U.S. 277, 282-283.)

(Continued from previous page)

(a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release."

There appears no basis here for granting review of a similar statutory scheme that equally furthers policies considered and favored by reasonable lawmakers.

—o—

PETITIONER'S AUTHORITIES DISTINGUISHED

Petitioner relies on the case of *Levy v. Louisiana,* 391 U.S. 68 (1968). In that case this Court ruled that the classification of illegitimate children precluded by statute from recovery for the wrongful death of their natural mother constituted invidious discrimination in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

However, the basis for the ruling in *Levy, supra,* was the lack of any rational relationship between the classification of illegitimate children and a reasonable governmental objective. As this Court stated, "Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother." (*Levy v. Louisiana, supra,* 391 U.S. at 72.) The difference between the *Levy* case, *supra,* and this case is the presence of a rational relationship between the immunities provided at Welfare and Institutions Code section 5154 and Government Code section 856 and one or more legitimate governmental objectives.

Petitioner also refers extensively to the decision of the California Supreme Court in *Tarasoff v. Regents of University of California,* 17 Cal.3d 425 (1976). Petitioner obviously believes the *Tarasoff* principles should have been applied here and support liability as to the County of

San Diego in this case. However, petitioner ignores the fact that the California Supreme Court applied the same provision of the Welfare and Institutions Code that petitioner here challenges as violative of the Equal Protection Clause of the Fourteenth Amendment. The California Supreme Court ruled in *Tarasoff, supra,* that the campus security officers who detained and then released the mental patient were immune from liability under Welfare and Institutions Code section 5154. (*Tarasoff v. Regents of University of California, supra,* 17 Cal.3d 425 at 449-450.)

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CONCLUSION

This Petition for Writ of Certiorari raises neither an important question of federal law nor identifies a decision by the state court of appeal that has been decided in conflict with applicable decisions of this Court. This Court's earlier decisions are clearly supportive of the broad powers of a state government to control its own governmental tort liability. The purposes underlying the immunity provisions of the challenged statutes are well supported and rationally related to legitimate governmental interests as already decided by this Court in *Martinez v. State of California, supra,* 444 U.S. 277.

For the reasons discussed herein this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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DATED: March 11, 1987

APPENDIX "1"[6]

Although I have concurred in the lead opinion, I write separately to specifically address one portion of Justice Staniforth's thoughtful dissent.

The dissent posit of an equal protection specter misses the analytical boat. The voluntariness or involuntariness of the commitment does meaningfully differentiate as to the legal issue in this case. The dissent suggests the affected classes are those victims who are damaged by acts of the persons released, one being allowed to sue the releasing authority where the commitment was voluntary, and another barred from doing so where the commitment was involuntary. However, the fact is that releasing authorities have no control over voluntarily-committed patients. Those persons may sign out at will. There is no "release" which is subject to the discretionary control of the housing facility. The involuntarily committed may only be released in accordance with statutory guidelines, one of which is the discretion of the staff. The departure of a voluntary patient imposed no liability on staff for an improvident release while, in the absence of statutory immunity, liability could be established on proper facts where the patient is subject to nonconsensual confinement. Considered in light of the legal authorities in the two situations, the relevant legal classes are distinct and different.

WORK, J.

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[6]Petitioner's version of the decision issued by the Court of Appeal of the State of California, Fourth Appellate District, Division One, attached as Appendix A to her petition, omitted the concurring opinion discussing the lack of an equal protection argument available to petitioner.